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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 634

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 634

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Union Pacific Railroad Company, petitioner herein, prays a writ of certiorari to review the judgment of the United States Court of Claims entered on January 3, 1950, in the above entitled case, No. 46989.

Summary Statement of the Case

Petitioner's claim against the United States in this case is for underpayments on Union Pacific freight bills for transportation over Union Pacific lines between Ogden, Utah, or points east of Ogden, and Portland, Oregon, or points beyond Portland, during a period from 1940 to 1942. The dispute between the Union Pacific and the Government—and the only question presented—is the proper method of

constructing the lowest net rates, through land-grant deductions, available to the Government under the terms of the Standard Freight Land-Grant Equalization Agreement. There is no dispute over the character of the traffic —as military or non-military—or over the right of the Government to land-grant rates. The question is whether the method used by the carrier in constructing the lowest net rates available, or that used by the General Accounting Office, is correct.[1]

Petitioner is not a land-grant railroad but at the time of the transportation in question was a party to the Standard Freight Land-Grant Equalization Agreement (R. 4). That agreement provided that the railroads parties thereto would accept—for the transportation of freight for which the Government was entitled to reduced rates over land-grant roads—the lowest net rates available, as derived through land-grant deductions *from lawful rates* filed with the Interstate Commerce Commission or the various state commissions *applying from point of origin to destination at time of movement.*

The map included in the accompanying brief shows four routes between Ogden and Portland. One is the Union Pacific route by way of Pocatello, Idaho, shown in yellow. The second is the Union Pacific—Northern Pacific route through Silver Bow, Montana, shown in green; this route includes land-grant mileage over the Northern Pacific between Silver Bow and Portland. The third is the most direct Southern Pacific route through Fernley, Nevada, thence via Alturas, California, and Klamath Falls and

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[1] All land-grant rates were repealed by the Act of December 12, 1945, 59 Stat. 606, effective on October 1, 1946. This case involves a claim amounting to $20,224.78 on account of traffic handled from 1940 to 1942. A second case filed by petitioner, No. 48728, in which action has been suspended to await the final disposition of this case, involves a claim of $249,458.64 on account of shipments made from 1941 to October 1, 1946. There are no other similar pending cases or claims.

Eugene, Oregon, to Portland, shown in red; a distance of 1103.4 miles between Ogden and Portland, including land-grant mileage of 126.14 miles. The fourth is a longer Southern Pacific route from Ogden through Fernley, Nevada, *to Roseville, California* thence north through Eugene, Oregon, to Portland, as shown in blue; a distance of 1336.66 miles between Ogden and Portland, including land-grant mileage of 663.16 miles.

Taking into account the tariff rates applicable *via each route* and the land-grant mileage *in each route,* the Southern Pacific route *via Alturas* (the third route described above) offered the lowest net land-grant rates available on the traffic in question and the carrier's freight bills were therefore stated on that basis, i.e. on the basis of the through rates quoted in the tariffs *as applicable via Alturas,* with land-grant deductions of 5.715% based on the percentage of land-grant mileage *in that route.*

The settlements made by the General Accounting Office, on the other hand, were made on the basis of the same through rates quoted in the tariffs as *applicable via Alturas,* but with land-grant deductions of 24.807% based on the percentage of land-grant mileage *in the longer route via Roseville.*[2]

Petitioner's position is that if tariff rates applicable via one route and available only via that route are used, the land-grant deductions to be made from such gross rates must be determined on the basis of the land-grant mileage *in that same route.* That is to say, if the Government accepts and uses the through rates available only via the

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[2] As noted by the court below in its opinion (R. 16), the through rates between Ogden and Portland used as gross rates by both the carrier and the General Accounting Office were quoted in tariffs which provided that they would be available only via the route through *Alturas.* The rates applicable under the tariffs between Ogden and Portland *via Roseville* were higher combinations of local and other rates.

Alturas route it must also use the percentage of land-grant mileage in that same route to determine the land-grant deductions to be made in establishing the net rates. On the other hand, if the Government wants the benefit of the higher percentage of land-grant mileage in the Roseville route, for the purpose of larger land-grant deductions, it must then use the tariff rates applicable via that route.

The Court of Claims (Chief Judge Jones dissenting) denied the claim and upheld the settlements made by the General Accounting Office, on the ground that *Southern Pacific Company* v. *United States,* 307 U. S. 393, was controlling.

Question Presented

1. Whether the Court of Claims wrongly denied petitioner's claim by misinterpreting and misapplying the decision of this Court in *Southern Pacific Company* v. *United States,* 307 U. S. 393.

Specification of Errors

The Court of Claims erred:

1. In holding that the decision in *Southern Pacific Company* v. *United States,* 307 U. S. 393, is controlling and requires denial of petitioner's claim.

2. In holding that for the transportation in question the Government is entitled to net land-grant rates constructed by using as gross rates the through rates quoted in the tariffs *as applicable via Alturas* with land-grant deductions based on the percentage of land-grant mileage in the longer route via Roseville.

3. In holding that the net rates claimed by the Government are net rates "*lawfully available*" under the terms of the Standard Freight Land-Grant Equalization Agreement.

4. In holding that petitioner is not entitled to recover and in dismissing the petition.

Reasons for Allowance of the Writ

Petitioner submits that the writ of certiorari should be granted because:

1. The Court of Claims, in denying the claim, has misinterpreted and misapplied the decision of this Court in *Southern Pacific Company* v. *United States,* 307 U. S. 373.

2. The decision settles not only the claim involved in the present case, but also a larger claim filed by petitioner in a second case, No. 48728, in which the underpayments claimed on account of petitioner's freight bills for similar transportation between Ogden and Portland from 1941 to October 1, 1946, amount to approximately $250,000.

Respectfully submitted,

ELMER B. COLLINS,
LAWRENCE CAKE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 634

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion Below

The opinion of the Court of Claims (R. 15) is not yet reported.

Jurisdiction

The judgment of the Court of Claims was entered on January 3, 1950. This court has jurisdiction under Title 28, U. S. Code, Section 1255; Act of June 25, 1948, c. 646, 62 Stat. 869.

Statement of the Case

The case is stated in the petition for certiorari.

Specification of Errors to be Urged

The Court of Claims erred:

1. In holding that the decision in *Southern Pacific Company* v. *United States,* 307 U. S. 393, is controlling and requires denial of petitioner's claim.

2. In holding that for the transportation in question the Government is entitled to net land-grant rates constructed by using as gross rates the through rates quoted in the tariffs *as applicable via Alturas* with land-grant deductions based on the percentage of land-grant mileage in the longer route via Roseville.

3. In holding that the net rates claimed by the Government are net rates *"lawfully available"* under the terms of the Standard Freight Land-Grant Equalization Agreement.

4. In holding that petitioner is not entitled to recover and in dismissing the petition.

Outline of the Argument

I. Petitioner does not deny the obligation of an equalizing carrier—a party to the Standard Freight Land-Grant Equalization Agreement—to accept on traffic handled over its own lines "the lowest net rates which could have been obtained on the basis of tariffs on file with the Interstate Commerce Commission" via any other available route. *Southern Railway Co.* v. *United States,* 322 U. S. 72, 75-76. Petitioner recognizes and accepts that obligation, but contends (1) that it is specifically an obligation to accept net rates derived from "lawful rates" (as expressly provided in the Equalization Agreement), and (2) that the rates used and applied by the Government in this case are not lawful rates. The net rates used and applied by the Government, petitioner submits, are fictitious rates made regardless of the terms of the tariffs. They are fictitious rates because they are rates restricted by the tariffs to one route (the Alturas route) and applied to another route (the Roseville route), for the sole purpose of obtaining the larger land-grant deductions applicable via the latter route.

It is elementary that the *tariff* rates from which land-

grant rates are derived [3] are inseparable from the routes over which they are made applicable by the tariffs. Different routes between the same terminal points may take different rates, and rates which are published as applicable via one route are not lawful rates via another route. The Interstate Commerce Act does not require that the rates on all routes be the same. *W. P. Brown & Sons Lumber Company* v. *Louisville & Nashville R. Co.*, 299 U. S. 393, 395.

In this case the rates available under the tariffs *via Alturas* are not lawful rates *via Roseville*. There are other rates between Ogden and Portland via the Roseville route which are the lawful rates via that route.

The fallacy of the Government's position is that it has taken the rates available under the tariffs via Alturas and has applied them via Roseville. Rates so applied are not lawful rates. They are rates arbitrarily made regardless of the lawful tariff rates. The net rates derived from them—by land-grant deductions based on the percentage of land-grant mileage in the Roseville route—are not net rates "lawfully available" under the terms of the equalization agreement.

II. *Southern Pacific Company* v. *United States*, 307 U. S. 393, which the Court of Claims considered controlling, involved a controversy between the Government and the Southern Pacific, a land-grant railroad, over the elimination by cut-offs and new construction of large parts of the original Southern Pacific land-grant route between San Francisco and Portland. The original Southern Pacific route between San Francisco and Portland was 85% land-grant aided (100% between Roseville and Portland) and

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[3] "Lawful rates filed with the Interstate Commerce Commission or the various State Commissions applying from point of origin to destination at time of movement" as provided in the equalization agreement (R. 4).

the Southern Pacific was therefore under a statutory obligation to carry Government freight between San Francisco and Portland at reduced rates. In time, as the result of new construction and cut-offs, a shorter route was established consisting in part of sections of the old route and in part of new construction. Both the original route and the new route were kept in operation and prior to November 11, 1931, the terminal to terminal tariff rates over the two routes were the same, but after that date the tariff rates were made lower over the new route. It was contended, and the contention was upheld by the Court of Claims and this court, that the Government was entitled to the lower through rates via the new route, with the same land-grant deductions that had always been made, i. e. based on the original land-grant mileage. The decision was apparently based in part on the finding that for many years it had been settled by administrative rulings and decisions that land-grant deductions should be based on the original routes and mileage without regard to later cut-offs or shortening of the original routes, and in part on the ground that so far as terminal to terminal transportation was concerned the new route was not a new line but simply another way of carrying goods by the same railroad between San Francisco and Portland.

Petitioner submits that the rationale of the Southern Pacific case may well be accepted as just and fair without at all impinging on the merits of petitioner's case. In such cases involving land-grant railroads it is inescapable that it has always been a major premise that the land-grant railroads should not be permitted to defeat the provisions of the land-grant statutes (under which vast areas of public lands were granted in aid of railroad construction) which provided for reduced rates on Government traffic over such railroads.

This is an altogether different case. The Union Pacific is not attempting to avoid any statutory obligation to carry Government freight at reduced rates. The Union Pacific, it is true, is under a contractual obligation to accept land-grant rates but that obligation is spelled out clearly in the equalization agreement. It is to accept "the lowest net rates lawfully available, as derived through deductions account land-grant distance from lawful rates filed with the Interstate Commerce Commission * * * applying from point of origin to destination at time of movement." There is nothing in that language which authorizes the Government to take tariff rates applicable via one route and to apply and use them as though they were applicable over another route for the purpose of obtaining the larger land-grant deductions applicable over the latter route. The action of the Government in doing so is arbitrary and contrary to the express terms of the equalization agreement.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 634

UNION PACIFIC RAILROAD COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 15-19) is reported at 87 F. Supp. 957.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1950 (R. 19.) The petition for a writ of certiorari was filed on February 27, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

The Southern Pacific Railroad had two routes between Ogden, Utah and Portland, Oregon, on both of which routes the United States, prior to 1946, was entitled to land-grant deductions. It filed tariffs with the Interstate Commerce Commission for through rates over the newer, shorter route, of which 126.14 miles, or 5.715 percent, comprised land-grant mileage. Over the older, longer route—663.16 miles of which comprised land-grant mileage, entitling the United States to 24.807 percent land-grant deduction—it filed no through rates but required that through freight moving over that route pay the aggregate of several local rates. Petitioner, which was not a land-grant railroad, had entered into a Standard Freight Land-Grant Equalization Agreement, whereby it undertook to transport government freight at the same rate to which a land-grant railroad, operating between the same points, would have been entitled. In computing the amount due petitioner for transporting certain government freight between Ogden and Portland, the accounting officers of the Government took the tariff filed by the Southern Pacific Railroad for through traffic between those points over the newer route and deducted therefrom 24.807%, the percentage deduction attributable to the land-grant mileage over the older route rather than, as urged by petitioner, the 5.715 percent deduction based on the 126.14 land-grant mileage on the newer route.

The question presented is whether the Government's method of computing the amount due petitioner under the Equalization Agreement was erroneous.

STATEMENT

The action in the Court of Claims was brought by petitioner to recover a balance of $21,068.05, alleged to be due on account of the transportation of freight for the United States under the terms of a Freight Land-Grant Equalization Agreement.[1] The facts giving rise to the claim are not in dispute.

In 1939, petitioner, a non-land-grant railroad, and the United States entered in a Freight Land-Grant Equalization Agreement (R. 4-6) wherein petitioner agreed (R. 4)

> * * * to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from lawful rates filed with the Interstate Commerce Commission or the various State Commissions applying from point of origin to destination at time of movement.

Between August 3, 1940 and August 28, 1942, petitioner transported over its lines certain freight

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[1] This case now involves the sum of $20,224.78, since certain claims asserted in Union Pacific's petition to the Court of Claims have been withdrawn (R. 13; Pet. 2).

shipments for the United States between Ogden, Utah and Portland, Oregon (R. 9). At the time of these shipments there were available under the published tariffs four routes between Ogden and Portland (R. 10): (1) Union Pacific route via Pocatello, Idaho, shown in yellow on map attached to the petition; (2) Union Pacific-Northern Pacific route via Silver Bow, Montana, shown in green; (3) Southern Pacific route via Fernley, Nevada and Alturas, California, shown in red; (4) Southern Pacific route via Fernley, Nevada and Roseville, California, shown in blue. Prior to 1926, the only route of the Southern Pacific Company between Ogden and Portland was via Roseville, a distance of 1336.66 miles, including 663.16 miles of land-grant mileage (R. 8). The land-grant deduction based on the percentage of land-grant mileage in this route was 24.807% (R. 8). In the period 1926-1929, the Southern Pacific Company shortened the route between these terminals. This newer route was composed of the original main line from Ogden to Fernley, then a cut-off via Alturas to a point on the main line near Eugene, Oregon, thence to Portland, a total distance of 1103.4 miles, including 126.14 miles of land-grant mileage (R. 8). The land-grant deduction for freight moved over this route, if based exclusively on the land-grant mileage contained therein, would be 5.715% (R. 16).

The shipments involved in this claim consisted of public property for which the United States was entitled to reduced rates for its transportation over land-grant railroads (R. 10). Pursuant to the Equalization Agreement, therefore, petitioner submitted bills for its transportation services computed on the basis of net land-grant rates (R. 10). In computing such rates, petitioner used the published tariff rates for the newer Southern Pacific route via Alturas and made a 5.715% land-grant deduction, based on the percentage of land-grant mileage contained in that route (R. 11, 16). The Government's accounting officers, however, took a different view of the requirements of the Equalization Agreement, and made payment on the basis of lower net rates. Such rates were constructed by using as gross rates the lawfully published tariff rates for the Southern Pacific Alturas route, with a 24.807% land-grant deduction based upon the percentage of land-grant mileage contained in the original Southern Pacific route via Roseville (R. 12, 16).

In April, 1946, petitioner filed suit in the Court of Claims for the difference in the amount paid by the United States and the amount due according to its own computation, contending that if the Government used the rates applicable via one route, the percentage of land-grant deductions to be made from such rates must be determined on the basis of land-grant mileage in that same route (R.

1-4). The court below denied recovery and dismissed the petition (R. 19).

ARGUMENT

The only issue here is whether petitioner's method of computing net land-grant rates for terminal to terminal transportation or the method used by the Government is correct. This depends on whether the lower net rates arrived at by respondent were "lawfully available" to the Government under the Equalization Agreement or, in other words, whether Southern Pacific would be entitled to any higher rate for the transportation of the same freight between the same points. We submit that the decision below, approving the method employed by the United States, is plainly correct, and that the question is not one of any general importance. In this circumstance, review by this Court is not warranted.

1. Since it is the policy of the Government to move federal property at the lowest available rates, it declined, when land-grant deductions were available, to use higher cost non-land-grant routes. 22 Comp. Dec. 129, 130. In order, therefore, to obtain as large a share of government traffic as possible, many non-land-grant roads entered into "freight land-grant equalization agreements" with the Government. See *Southern Railway Co.* v. *United States,* 322 U. S. 72, 73; *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 394, fn. 1. Such an agreement (R. 4-6) is involved here. In it, peti-

tioner agreed "to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available * * *" (R. 4). *Supra*, p. 3.

Since at the time of the shipments involved here there was a land-grant road, the Southern Pacific, between Ogden and Portland, it is not disputed that respondent was "lawfully entitled to reduced rates" on shipments of government property between these terminals. The question is as to the method of computing these reduced rates. In our view, the decision in *Southern Pacific Co.* v. *United States*, 307 U. S. 393, is precisely analogous and dispositive of the issue here. In that case, the Southern Pacific, a land-grant carrier, had two lines between Portland and San Francisco. The two routes were identical for a considerable portion of the distance between these terminals. The older line was called the Siskiyou Route and contained more land-grant mileage than the newer or Cascade Route. This Court held that the Government, in computing the compensation due a land-grant carrier for terminal to terminal transportation, was entitled to deduct from the lower tariff rates available on the newer route the higher land-grant percentage deduction applicable to the original route. See also *United States* v. *Northern Pacific Railway Co.*, 30 F. 2d 655 (C. A. 8). An iden-

tical method of computation was employed by the United States in the present situation,[2] and the rationale of the *Southern Pacific* case compels the conclusion that the rates arrived at by respondent would have been the proper transportation charges had the Government shipped via the Southern Pacific. Thus, the net rates computed by respondent were "lawfully available" to the Government and under the terms of the Equalization Agreement petitioner was entitled to no more than the "net rates which a land-grant carrier would be entitled to receive for such transportation service" (R. 17). Moreover, the Government's accounting officers were required to make payment on the basis of the lower net rates since it cannot be assumed that the Government, in entering an equalization agreement, intended to grant "the equalizing carriers more favorable rates than those to which it was lawfully entitled on the land-grant routes." *Southern Railway Co.* v. *United States,* 322 U. S. 72, 76.

It is petitioner's contention that if respondent uses the lower tariff rates applicable to the Southern Pacific route via Alturas, the land-grant deductions to be made from such rates must be determined from the percentage of land-grant mileage

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[2] In computing its terminal to terminal net rates, respondent used the lower tariff rates available on the Alturas route of the land-grant Southern Pacific, and made land-grant deductions on the basis of the higher percentage of land-grant mileage in that carrier's older route via Roseville (R. 12, 16). *Supra,* pp. 4-5, 7.

in that route; that tariff rates are inseparable from their particular route; and that respondent's net rates, therefore, are not derived from "lawful rates" as required by the Agreement since respondent "has taken the rates available under the tariffs via Alturas and has applied them via Roseville" (Pet. 8, 9). But these are the same arguments advanced by the petitioner in the *Southern Pacific* case and explicitly rejected by this Court. The present petitioner's argument would require an overruling of that case which, we submit, is sound, requires no defense on our part, and need not be reexamined at this late date.[3]

2. This case is of no general or prospective importance. The Transportation Act of September 18, 1940, 54 Stat. 898, Sec. 321 (49 U. S. C. 65(a) relieved land-grant railroads of the obligation to carry persons or property for the United States at reduced rates, except military or naval property of the United States moving for military or naval and not for civil use. The Act of December 12, 1945, c. 573, 59 Stat. 606, effective October 1,

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[3] In an attempt to distinguish the *Southern Pacific* case, petitioner states (Pet. 10) that the Southern Pacific Company was a land-grant carrier and was under a statutory obligation to transport government property at reduced rates. Petitioner then asserts that "this is an altogether different case. The Union Pacific is not attempting to avoid any statutory obligation to carry Government freight at reduced rates" (Pet. 11). Such a distinction is wholly immaterial. Petitioner's contractual obligation to transport government freight for the same rates which a land-grant carrier would be entitled to receive is equally binding.

1946, repealed all land-grant rates. So far as we know, very few land-grant cases are pending and only one, referred to by petitioner at p. 2 of its petition, is pending which involves the precise question here presented. It is extremely doubtful that, in the short period of time remaining before the limitations period expires (October 1, 1952), any other case involving this question will arise. After that date, no new cases of this character can be filed.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. The matter is not one of general importance. It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

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